

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Cowell Imports Inc.
operating as “Land Rover of Richmond”

(“Cowell” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/504

DATE OF HEARING: November 8th, 1999

DATE OF DECISION: November 16th, 1999

DECISION

APPEARANCES

Gary Cowell, President for Cowell Imports Inc.
James Wardstrom on his own behalf
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Cowell Imports Inc. operating as “Land Rover of Richmond” (“Cowell” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 26th, 1999 under file number ER 005908 (the “Determination”).

The Director’s delegate determined that Cowell owed its former employee, James Wardstrom (“Wardstrom”), the sum of \$7,848.32 on account of unpaid overtime wages, concomitant vacation pay and interest.

ISSUES TO BE DECIDED

Cowell’s appeal raises two issues: first, it says that Wardstrom was not entitled to be paid overtime because he was a “manager”; second, and in any event, Wardstrom actually worked only about one-quarter of the overtime hours claimed and thus the Determination ought to be reduced accordingly.

FACTS AND ANALYSIS

The Overtime Claim

During the relevant period, Wardstrom was employed as the “Assistant Service Centre Manager” at Cowell’s “Land Rover” automobile dealership located at the Richmond Auto Mall. Wardstrom had responsibilities relating to both the parts and service departments. He reported to the Service Centre Manager, Mr. Mike Davies.

The delegate found that Wardstrom worked at least one hour of overtime each regular working day from August 1st, 1997 to June 5th, 1998. Wardstrom testified that he reported for work each day at 8 A.M. and usually did not end his work day until 5:30 P.M. On two or three days each week, his

workday was even longer, as he was either picking up or dropping off customers' vehicles after 5:30 P.M. Wardstrom says that he rarely, if ever, had an uninterrupted 1-hour lunch break and usually ate his lunch at his desk while continuing to serve customers or attend to other duties. Thus, accepting Wardstrom's evidence, in light of section 32(2) of the *Act*, his meal breaks must be considered to be working time.

Wardstrom's position is that, in fact, he worked *more* than 1 overtime hour each day and, thus, the Determination represents a conservative--even understated--estimate of his overtime pay entitlement.

It is, of course, axiomatic that in an appeal such as this the employer bears the burden of proving that the Determination is incorrect. In this case, Wardstrom's evidence as to his working hours is *uncontradicted*. Cowell, operating on the assumption that Wardstrom was a "manager" (and, therefore, not entitled to overtime pay), did not track Wardstrom's daily working hours. Neither of Cowell's two witnesses--its president, Gary Cowell, nor its controller, Michelle Steele--was in a position to contradict, based on their own observations, Wardstrom's testimony as to his hours worked. Ms. Steele, for her part, worked out of a separate location from Wardstrom and only dealt with him by telephone or memo. Ms. Steele frankly conceded that she had no personal knowledge whatsoever regarding Wardstrom's daily work schedule.

Similarly, although Mr. Cowell attended the Land Rover dealership on a regular basis, these attendances were of limited duration and not for the specific purpose of meeting with, or otherwise monitoring, Wardstrom. Wardstrom did not report to Mr. Cowell and, tellingly, the one person best positioned to comment on Wardstrom's hours, namely, Mr. Davies, did not testify before me. Indeed, as noted in the Determination, Mr. Davies' written statements provided to the delegate corroborate Wardstrom's position. I also note that other witnesses who might have testified regarding Wardstrom's hours (*e.g.*, the dealership general manager or one or more of the service technicians) were not called as witnesses.

In sum, the employer has manifestly failed to discharge its burden of proving that the Determination ought to be varied as it relates to Wardstrom's overtime pay claim. Thus, the Determination must be confirmed unless it can be said that, regardless of the the number of overtime hours worked, Wardstrom was nonetheless not entitled to overtime pay by reason of his status as a "manager". I shall now turn to this issue.

Was Wardstrom a "manager"?

Section 34 of the *Employment Standards Regulation* states that the hours of work and overtime provisions of the *Act* (*i.e.*, Part 4) do not apply to, *inter alia*, a "manager". A "manager", as defined by section 1 of the *Regulation*, "means a person whose *primary employment duties* consist of supervising and directing other employees" (my *italics*).

Undoubtedly, Wardstrom had some supervisory responsibilities but these duties were very limited and were always subject to review by his immediate supervisor, Mr. Davies, to whom Wardstrom

reported. Wardstrom did not hire nor fire anyone. He did not appraise anyone. He never disciplined anyone. He never made any recommendations as to pay raises or promotions for anyone. He had no policy-making authority nor was he part of the “executive management team” at the dealership. Although he held the title “assistant manager”, as the Tribunal has stated in numerous decisions, it is not the *title* that is important but rather the actual *job function*. The bulk of Wardstrom’s workday was spent dealing with customers and other third parties--*e.g.*, filling parts orders from other repair automobile facilities around the lower mainland. Wardstrom’s job description, prepared by the employer in September 1997, describes the “Primary Focus” of his position as filling parts orders, updating price lists and maintaining an appropriate parts inventory--there is nothing listed in the job description under “Primary Focus” that relates, in any fashion, to supervisory responsibilities.

The only independent “supervisory” authority Wardstrom exercised was in regard to authorizing overtime (although that was usually done by Davies) and in allocating work to the service technicians at the beginning of the workday. Those two, rather limited, supervisory functions (if one could even so characterize such activities) fall well short of meeting the regulatory requirement that supervisory duties be the “primary” function of the individual in question.

In my view, the delegate correctly determined that Wardstrom was not a “manager” as defined by section 1 of the *Regulation* and, therefore, the employer was obliged to pay overtime. As I have previously noted, I see no reason to disturb the delegate’s findings as to the actual number of overtime hours worked.

The appeal is accordingly dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$7,848.32** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal